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IN THE

Supreme Court of the United States

October Term, 1962

No. —— 70

HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS

v.

NATIONAL LABOR RELATIONS BOARD

GALLAGHER BROS. SAND & GRAVEL CORP., BILKAY HOLDING CORP., HAMPTON SCOWS, INC., NEPTUNE LINE, INC. and ROCKVILLE SCOWS, INC.

v.

NATIONAL LABOR RELATIONS BOARD

NATIONAL LABOR RELATIONS BOARD

v.

CHARLES J. KING and DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION AFL-CIO

PETITION OF DECK SCOW CAPTAINS LOCAL 335, INDEPENDENT, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION OF DECK SCOW CAPTAINS LOCAL 335, INDEPENDENT, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Deck Scow Captains Local 335, Independent, petitions for a writ of certiorari to review the judgments of the Court of Appeals for the Second Circuit, entered on September 20, 1962, and October 1, 1962, denying petition for rehearing en

banc of judgment of Court of Appeals for the Second Circuit entered on July 31, 1962, denying enforcement and setting aside an order and decision of the National Labor Relations Board.

Opinions Below

Neither the judgment of the Court of Appeals on the petition for rehearing (Appendix B, pp. 40-41) is reported. The opinion of the Court of Appeals denying enforcement and setting aside the Order and Decision of the Board (Appendix B, pp. 25-39) is reported at 306 F. 2d 89 (1962). The Board's Decision and Order together with the Trial Examiner's Consolidated Intermediate Report (Rec. Vol. III, pp. 5a-77a) are reported at 136 N. L. R. B. No. 79.

Jurisdiction

The last judgment of the Court of Appeals for the Second Circuit was entered on October 1, 1962 (Appendix B, p. 41). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Statutes Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 29 U. S. C. 151 *et seq.*) and the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 531, 29 U. S. C. 462) are set forth in Appendix A, pp 21-24.

Questions Presented

1. Whether the Court of Appeals may refuse to enforce an order of the National Labor Relations Board by drawing

inferences from and arriving at conclusions of facts contrary to the reasonable inferences drawn and conclusions made by the Board from the same facts?

2. Whether a person appointed as a trustee, without authority and in violation of Sec. 302 of the Labor Management Reporting and Disclosure Act, be considered a labor organization within the provision of the National Labor Relation Act?

STATEMENT OF CASE

I. The Board's Finding of Fact

Briefly, the Board found that by withdrawing recognition from the union which represented its employees and by recognizing respondent Union, the Harbor Carriers of the Port of New York and its members, hereafter called the Association, violated Section 8(a)(2), (5) and (1) of the Act. The Board further found that two Association members violated Section 8(a)(3) and (1) by discharging employees for refusing to join respondent Union, and that respondent Union violated Section 8(b)(1)(A) and (2) by threatening to cause the discharge of one employee and by causing the discharge of another for refusing to join it. The violations found by the Board stem from the disaffiliation of a deck scow local, Local 335, from the United Marine Division of the National Maritime Union on May 29, 1961, followed by the Association's withdrawal of recognition from Local 335, which after that date became an independent union, and its recognition of respondent Union, Local 335, U.M.D. The substantially undisputed facts on which the Board's decision is based are summarized below.

A. Bargaining History.

The Association consists of employers who own or operate scows, barges and tugs in the New York area. Those

employers who transport freight for hire comprise the Harbor Carriers Division of the Association; those which transport their own materials—largely sand or gravel—comprise the Industrial Division.

The employers in each division employ deck scow captains, nonsupervisory employees who tend the scows-landing lines, pumping seepage, and otherwise looking out for the general welfare of the scow. The scows are not self-propelled and must be towed from place to place by tugs. The deck scow captains in the New York area have had a local union of between 700 and 1000 members since about 1934. For many years the deck scow local has had bargaining contracts with the Association, the most recent having been executed in 1959 to expire March 31, 1961.

During its history the deck scow local had a variety of affiliations. In 1954 the deck scow local, the tugboat local, and several other marine locals were sublocals of Local 933, International Longshoremen's Association. In that year the sublocals disaffiliated with the I.L.A. and affiliated with District 50, United Mine Workers. Sometime later, the deck scow local, apparently along with the other marine locals, disaffiliated from the U.M.W. and obtained a federal charter from the American Federation of Labor. In 1956, a new entity, the "United Marine Division" with its "subordinate locals," affiliated with the National Maritime Union, as "an autonomous division with autonomous locals." Under this arrangement, the deck scow local became Local 335, U.M.D.-N.M.U., and the tugboat local became Local 333, [redacted].-N.M.U. The president and the secretary-treasurer of the tugboat local, the largest of the group, held the same offices in the U.M.D. Throughout the various changes in affiliation, the Association continued to recognize the deck scow local, however affiliated, as the bargaining agent for the deck scow captains.

B. The deck scow local votes to disaffiliate from the U.M.D.-N.M.U. and the Association withdraws recognition.

1. Following an attempt to merge it with the tugboat local, the deck scow local votes to consider disaffiliation from the U.M.D.

On April 3, 1960, Tugboat Local 333 President O'Hare attended a special meeting of Local 335 and spoke on the desirability of Local 335's merging into his tugboat local. The membership of Local 335 voted a referendum on the merger but at the next meeting the action was rescinded. At the latter meeting, to secure a larger attendance, the regular meeting was changed from the third Monday to the third Sunday of each month and a printed notice to that effect was distributed to the membership.

At the regular meeting of Local 335 on May 15, the membership voted to accept the resignation of the local's secretary-treasurer, Hugo Kasten, and elected Thomas Wilhelm to fill Kasten's unexpired term ending in October. A motion was also adopted to hold a special meeting on May 29 to vote whether Local 335 should disaffiliate from the U.M.D.-N.M.U.

On May 17, Secretary-Treasurer Wilhelm discharged the local's clerk, Thomas Anglim. The same day Wilhelm wrote and distributed to the membership a letter which described the meeting on May 15 and gave notice of the special membership meeting on May 29 to vote on disaffiliation. The next day Thomas Anglim appeared at the hiring hall of Tugboat Local 333, where a sign was posted which read "(Deck Scow) Local 335."

2. The U.M.D. purports to impose a trusteeship on the deck scow local.

On May 20, Willard Quick, secretary-treasurer of Tugboat Local 333 and of the U.M.D. wrote the Association

on a U.M.D. letterhead stating that as the "parent organization of Local 335" the U.M.D. had appointed Thomas Anglim, the former clerk of Local 335, as "temporary administrator" of Local 335 to replace the elected officers of the local, and advising the Association to deal with Anglim at the U.M.D. office in all matters concerning the contracts until further notice.

On May 23, David Graham, for 25 years delegate of Local 335 and one of its two paid officers, wrote the Association that as Local 335's duly elected representative he would continue to transact its business "in accordance with the contract now in force." The letter called particular attention to the contract provision requiring the use of the local's hiring hall and stated that the local would "insist on strict compliance with all other provisions of the contract." Graham delivered the letter personally to William Cleary, executive vice president of the Association, who asked what had happened; Graham replied, "I am still doing business at the same old stand."

On May 26, the Association met and, as a result of the conflicting claims arising from Quick's and Graham's letters, decided to retain counsel. A day or so later, Cleary called a U.M.D. representative, either Quick or William Hannan, its counsel, to ask if there were any further developments in the internal situation of the union. He was advised that the U.M.D. would administer the Local 335 contract through Anglim and expected the Association to live up to the contract; Cleary responded that the Association would do so.

3. The deck scow local disaffiliates from the U.M.D. and the Association withdraws recognition.

On May 29, Local 335's special meeting on disaffiliation was held pursuant to the motion passed on May 15 and the notices mentioned above. First, the motion was adopted

that if the local disaffiliated all its assets, including the contracts with the Association, would remain the property of the local. A vote by secret ballot was then held, with about 130 voting for disaffiliation and about 14 against. A committee was appointed to seek affiliation with some international union and report to the membership. That day Wilhelm wrote the Association advising of the local's action and the resultant change of name and requesting that future correspondence be directed to "this Local Union unaffiliated" at the same address until further notice.

On May 31, the Association met and determined to adhere to the substantive portions of the contract but not to use either local as a hiring hall. On June 2 Wilhelm wrote the Association that the employers were violating the contract by not reporting vacancies to the union. The letter requested the Association to cease the violation and to furnish Local 335, Independent, with the names of all deck scow captains hired since May 16.

On June 10, Wilhelm again wrote the Association concerning the failure to comply with the hiring hall provision of the contract and requesting a meeting on June 15 "to hear, determine and attempt to resolve the above dispute." The same day Wilhelm mailed and distributed to the membership a letter announcing that the International Brotherhood of Teamsters, the International Longshoremen's Association, the National Maritime Union, and the Seafarers International Union had been invited to attend a meeting June 19 at which the membership would vote on renewed international affiliation.

On June 14, the Association met and discussed the possibility that Local 335, Independent, would affiliate with the Seafarer's International Union or some other international union. The fear was expressed that if the local did so there could be "grave implications" arising from possible conflict between the N.M.U., which still included the tugboat local,

and the new international. The Association determined that the "most prudent course" would be to stay with the U.M.D.-N.M.U. and as a result of this meeting Cleary wrote Wilhelm that neither they nor their members have any contract with Deck Scow Captains' Local 335 and they will not meet with them. The letter asserted that the Association's contract was with the U.M.D. affiliate and that the Association had been advised that Mr. Jim Murray had been appointed administrator . . . and Mr. Tom Anglin was the office manager. Cleary's letter was reproduced and distributed to the Association members and to the U.M.D. It was the only reply the Association made either to Wilhelm's requests for meetings and for information or to Graham's letter.

On June 15, Wilhelm replied that Cleary's letter represents an obvious breach of agreement in effect between the Local, the Associatfon and its members. The letter recited the events of the disaffiliation meeting and enclosed a certified copy of the resolution assigning all assets, including the contracts, to the disaffiliated local. It also advised that the local would vote on affiliation with another international on June 19 and again requested a meeting.

4. The deck scow local affiliates with S.I.U.

On June 19, by secret ballot, Local 335 voted to affiliate with the Seafarer's International Union by a vote of 160 to 5 for all other choices. On June 20 Wilhelm wrote the Association of the new affiliation and stated that Local 335 expected the Association and its members to immediately honor its contractual obligations with Local 335. Cleary did not reply but distributed copies of Wilhelm's letter to the Association members with the notation that the letter required no action.

C. Association member discharges two employees and deck scow captains strike; following the strike the S.I.U. withdraws its charter.

Meanwhile, on June 9, O'Hare wrote a large number of the deck scow captains announcing that James Murray Miller, business agent of Tugboat Local 333, had been appointed business agent of Local 335 as well, that Anglim was administrator and that only these two were authorized to collect dues. The letter requested the addressee to sign and return a pledge card and an application for membership in Local 335, U.M.D.-N.M.U. which were enclosed. It also enclosed, without comment, a "Constitutional and By-Laws of Local 335, United Marine Division, National Maritime Union" which stated that it was effective May 15, 1960 and differed substantially from the one then in effect. In a later undated letter to deck scow captains, O'Hare and Miller again requested the addressees to fill out a new application card.

Thomas Serpa and Antonio Da Cruz, deck scow captains employed by Suffolk Dredging Corporation, an Association member, were members of Local 335 before May 29. On July 15 two men approached Serpa at work and asked to see his union card. Serpa showed his card, indicating dues paid to Local 335, S.I.U.; one of the men remarked that that was not good that they didn't want him. The men spoke to Superintendent Peterson, who also remarked that Serpa's card was "no good." Shortly afterward, Peterson told Serpa that he would have to let him go, but that if Serpa joined with "that man" he could go back to work; Serpa declined and left.

That same day Business Agent Miller asked Da Cruz to accept "a yellow card (from Local 335, U.M.D.-N.M.U.) as a new union." Miller told him, "If you don't join our union then you will have to leave the boat" and a few minutes later Supervisor Madden, after talking with Miller, told

Da Cruz to leave the boat. Miller then directed a nearby tugboat captain not to move Da Cruz's scow unless Da Cruz agreed to join with Local 335, U.M.D.-N.M.U. After further discussing union membership with Da Cruz, Peterson told him, that he was fired and should get out of the boat and Da Cruz left.

On June 17, Local 335, S.I.U. voted 367 to 1 to strike against Suffolk and against Colonial Sand & Stone Co., another Association member. The strike, which was accompanied by picketing, began July 20 and lasted five days. At the conclusion of the strike, Da Cruz and Serpa were reinstated to their jobs.

In September 1960, the S.I.U. withdrew the charter it had granted to Local 335 and the local thereafter remained independent.

D. Local 335, U.M.D., threatens further discharges and causes the discharge of employee Elgahim.

Robert Bicknell, a scow captain, employed by Colonial Sand & Stone Co., paid his dues to Local 335, S.I.U., in July 1960, for the balance of the year. On November 7, 1960, he was told by Richard Baard, a Colonial supervisor, that he was being laid off, presumably because he did not belong to the "other union." Bicknell and Baard then telephoned Anglim, the U.M.D. administrator, who said he knew of no order to lay off Bicknell, and Baard thereupon restored him to the payroll. On November 9, Bicknell went to see Anglim about the incident and talked to Miller, the U.M.D. business agent, instead. Miller told Bicknell that before the end of the year, all deck scow captains would have to join Local 335, U.M.D. or they would not work.

Husseim Elgahim was employed by Colonial in October 1960 after he had been referred by Miller. In January 1961 agents from both the Independent and U.M.D. locals approached Elgahim for dues. He promised to pay the In-

dependent first and told the U.M.D. he would not pay two unions. On January 9, the U.M.D. representative again demanded dues and told Elgahim that if he did not pay he would be laid off. Shortly afterwards, Anglim asked Chief Dispatcher Regazzi to have Elgahim laid off for failing to pay dues and Regazzi did so. Elgahim then went to Wilhelm who called Regazzi about it; Regazzi said that he had let Elgahim go because he had not paid his union dues, continuing to observe, "I wish you two guys would get it straightened out down there. We recognize the local, the U.M.D." On January 16, after unfair labor practice charges had been served, Colonial reinstated Elgahim.

The Board found that Local 335, Independent, was the alter ego or continuance of the organization that entered into the 1959 contracts and that after May 29, the Union calling itself Local 335 U.M.D. was basically a different organization. Thus Local 335, Independent, retained possession of the assets, records and offices of the contracting union. Until its regular election in October 1960, its officers were those elected prior to the disaffiliation, including David Graham, who had been delegate of the deck scow local for 25 years through all the changes in affiliation. Its members continued to use their old membership cards and it operated under the old constitution. On the other hand, the administrator appointed by O'Hare, whether the Independent's discharged clerk Anglim or the Tugboat local's business agent Miller, neither demanded nor obtained the possession of the local's assets, records or offices nor assumed its obligations. Moreover, O'Hare and Miller solicited the deck scow captains to sign new applications for membership and Miller threatened Elgahim with discharge if he did not accept a yellow card and "join our union." O'Hare circulated a new constitution purportedly effective May 15, 1960, which differed substantially from the old one, provided for associate membership during "organizational periods," and allowed O'Hare to appoint all officers. In short, before and after the disaffiliation

vote on May 29, the Wilhelm group had all the contracting union's accouterments except its name, while the O'Hare group had the name and nothing else.

As to the disaffiliation election of May 29, 1962, the Board found this was ratified by the membership of the Union by their signing of S.I.U. cards and the strike vote.

Also the Board found that the evidence in the record tended to disprove the existence of any U.M.D. Constitution, said Constitution would have been the one granting the U.M.D. the authority to appoint an administrator. (Record Vol. III, pp. 5a-77a.)

II. The Board's Conclusions and Order

The Board found that by withdrawing recognition from Local 335, Independent, which was the contracting union, the Association violated Section 8(a)(5) and (1) of the Act, and that by granting recognition to Local 335, U.M.D., the Association also violated Section 8(a)(2). The Board further found that Colonial and Suffolk violated Section 8(a)(3) and (1) by discharging employees Serpa, Da Cruz and Elgahim because they failed to join Local 335, U.M.D., and that by requesting the discharge of Elgahim and threatening to secure the discharge of all the other deck scow captains who did not join it, Local 335, U.M.D., violated Section 8(b)(1)(A) and (2) of the Act.

The Board's order requires the Association or its members individually to recognize Local 335, Independent, as the collective bargaining representative of the deck scow captains, and to cease recognizing Local 335, U.M.D., unless the Board certifies the latter as the collective bargaining representative of its employees. The order requires Suffolk, Colonial, and Local 335, U.M.D., to cease the unfair labor practices complained of and respectively to make Serpa, Da Cruz, and Elgahim whole for the loss of pay resulting from

the discrimination against them. Finally, all the above are required to post the customary notices (Rec. Vol. III, pp. 5a-6a).

III. Court's Decisions

This case came before the Court of Appeals for the Second Circuit on petitions for review of the Board's Order filed by the Harbor Carriers of the Port of New York and a number of its members (Rec. Vol. IV, p. 12) and the Request for Enforcement filed by the Board (Rec. Vol. IV, p. 21).

The Court of Appeals, in a two to one decision, denied enforcement and set aside the Board Order (Rec. Vol. IV, pp. 45-62).

The Court majority decided that the Local 335 did not ratify the disaffiliation vote because it stated that the significance of S.I.U. cards signed by the men may be interpreted differently than the Board interpreted them and the strike vote was interpreted by the Court as not a ratification of the disaffiliation, contrary to the Board's interpretation (Rec. Vol. IV, pp. 54-55).

The Court held that the old organization continued to function under the administration of one of its paid officials, who had been discharged by the Secretary-Treasurer of the Union (Rec. Vol. IV, pp. 55-56).

The Court stated that the fact that Local 335, Independent, had the same officers and all the assets of its predecessor did not indicate a continuation of identity, contrary to the Board's interpretation (Rec. Vol. IV, pp. 54-55).

The Court did not deal with any of the conduct of Local 335, U.M.D.-N.M.U., *i.e.* the signing of new pledge cards, the new constitution, etc., which the Board stated indicated that it was a new organization.

A petition for rehearing was filed on behalf of the intervenor, Local 335, Independent, on the grounds that the Court based its decision on a mistaken finding of fact and a mistaken application of the Board's criteria (Vol. IV, pp. 64-73). The mistaken finding of fact being that the Court found one of the paid officials continued on in the new Local 335, U.M.D.-N.M.U., as administrator, whereas the uncontroverted fact is that said administrator was merely the clerk of the union, an employee, and not in any way an official. Therefore, the Court was faced with the fact that his only grounds for authority was his appointment as administrator, and the U.M.D. had no constitution under which to appoint him. The Court denied this latter petition (Vol. IV, pp. 74-80).

ARGUMENT

I. The Court of Appeals drew inferences and conclusions from the facts contrary to the reasonable inferences and conclusions drawn by the Board.

The Board determined that because of certain criteria and actions, Local 335, Independent, was the alter-ego and continuation of the former Local 335, U.M.D.-N.M.U. The Board, with its expertise, interpreted the significance and importance of certain occurrences and incidents, *i.e.*, the significance of the continuance of officers and retention of assets, by Local 335, Independent, and the solicitation of new cards, the distribution of a new constitution, etc., by the new Local 335, U.M.D.-N.M.U., as well as the significance for ratification of the disaffiliation vote of the signing of S.I.U. cards and the strike vote. The Court majority, in dismissing the Board's order, ignored entirely certain of these facts and as to others it imposed its own interpretation as to their significance in determining the ultimate finding of fact, *i.e.*, which union was the continuation of the old Local 335, U.M.D.-N.M.U.

The Board in its expertise interpreted these facts as indicating Local 335, Independent, was the continuation of the old Union. The Court took these same facts and, ignoring the expertise of the Board, interpreted them their own way. The Board's interpretations as to the significance and meaning of these facts were at least as reasonable as the majority of the Court's. In fact, Justice Kauffman, in his dissent agreed with the Board's findings. Clearly, there was substantial evidence to support the Board's conclusion as to this ultimate finding of fact, that is that Local 335, Independent, was the alter ego of the old Union.

It was stated in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 474, 71 S. Ct. 456 (1951), at 488:

> "To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

If this rule is applied to the primary facts, it is only reasonable that this same rule should apply to the ultimate

facts. If the inferences drawn by the Board, in its expertise, are reasonable, they should not be set aside by a reviewing court because it would not have drawn these same inferences. See *N.L.R.B.* v. *Southern Bell T. & T. Co.*, 319 U. S. 50, 60, 63 S. Ct. 905, 910 (1943).

It is clear that the Board does and must have this power to draw reasonable inferences in order to adequately perform its functions. By virtue of its expertise, the Board is best equipped to draw these inferences. *Radio Officers Union, etc. v. N.L.R.B.*, 347 U. S. 17, 48-52, 74 S. Ct. 323, 340-342 (1954), and they should only be set aside if they are wholly unreasonable or unwarranted. *N.L.R.B.* v. *Southern Bell T. & T. Co., supra.*

Since the Board was correctly acting within its discretion in determining that under the facts of this case the employer's conduct constituted an unfair labor practice, this matter may be summarily disposed of in the granting of the writ of certiorari. See *National Labor Relations Board* v. *F. W. Woolworth Co.*, 352 U. S. 938, 77 S. Ct. 261 (1956).

II. The trustee was appointed in violation of Section 302 of the Labor Management Reporting and Disclosure Act, and therefore since he was the only indicia of the existence of the organization which he headed, said organization cannot be considered a labor organization within the provisions of the National Labor Relations Act.

The Court of Appeals majority has mistakenly based their opinion and decision upon findings not supported by the Board's order or the record and contrary to facts uncontroverted by any of the parties. As a result, that Court's majority failed to reach an issue decisive of this proceeding. Such issue is novel, of far reaching consequences and one of first impression before this Court. It involves the extent and impact upon labor organizations and labor management re-

lations of Section 302 of Labor Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Stat. 531, 29 U. S. C. Sec. 462 (Appendix A, p. 24), restricting the imposing of trusteeships by labor organizations upon subordinate bodies and the accommodation of such section with provisions of the National Labor Relations Act.

The Board found that Local 335, Independent, was the continuance of Local 335, United Marine Division, and that the administrator organization was a new organization and not such a continuance. Consequently the failure of the respondents to continue to recognize the Independent and their recognition of the administrator entity constituted violations of the Act.

The majority opinion in setting aside and refusing to enforce the Board's order, *inter alia*, found that: "Of the two paid officers, it appears that one remained loyal to the old union and was appointed administrator of its affairs, while the other associated himself with a new organization" (the Independent). The majority of the Court further found that: "the old organization did not disappear or become 'defunct'. It continued to function actively under the administration of one of its paid officials, who had been 'discharged' by the new secretary-treasurer, the leader, apparently, of the secession movement." Such findings as to the paid officers, the loyalty of one to the "old" union, his appointment as administrator, the "old" organization functioning actively under his administration, his discharge, are it is respectfully submitted, mistake of facts. On the contrary the Board found and respondents admit that the two paid officials remained at all times with the Independent; that the administrator appointed was never an officer, let alone a paid official, but on the contrary a clerk, merely an office employee of Deck Scow Captains Local 335, U.M.D., immediately prior to his appointment as administrator, and the individual who was so discharged by Secretary Treasurer Wilhelm immediately prior to his appointment as such administrator. So

that contrary to the Court's finding, there was no continuation of the active administration of the old organization by one of its "paid officials." By reason of this error, to wit, that the old organization continued functioning actively under the administration of its paid official and not under a trustee or administrator, it appears that the Court found it necessary and did not reach the issue presented by Section 302 of the Labor Management Reporting and Disclosure Act (Appendix A, p. 24), which issue had been raised by the intervenor, both before the Board and the Court.

It is submitted that the foregoing question is decisive of this case. For if it is found that as a matter of law, the trusteeship was illegal, said trusteeship being the sole indicia of the existence of the labor organization, then factually there was and could only be one organization, to wit, the Independent. At all times material herein, trusteeships could only be established in accordance with the provisions of such Section 302 (Appendix A, p. 24). Trusteeships may only be established when there is written constitutional authority for such action. Absent proof of such authority a trusteeship is violative of the law, nor is there any inherent power within a parent organization to impose such a trusteeship. The record is devoid of any constitutional authority for the United Marine Division's imposition of a trusteeship. On the contrary, the Board found evidence in the record to disprove even the existence of any United Marine Division constitution, but made no finding on this point on the ground that it was not necessary, and on the further ground that it was immaterial to the issues therein. The Board concluded that it was not its function to determine violations of such Section 302 (Appendix A, p. 24). However, before this Court is this very issue. Can an organization established in violation of law, contrary to public policy, be deemed a continuation of Deck Scow Captains Local 335, UMD? To find affirmatively would produce the incongruous spectacle of laws adopted to protect and preserve industrial

stability and employee rights, being blunted and disregarded and the illegal result, utilized by the wrong-doers to their benefit. Certainly such conduct could never be sanctioned by a Court.

The trusteeship which the United Marine Division attempted to create on May 20th, and which the respondents recognized even prior to the May 29th vote, was a nullity as a matter of law. This status the respondents could easily have ascertained by the simple expendient of inquiring as to the authority for the trusteeship, mandated by Congress by virtue of such section 302. There was and could only be one organization, the same union that made the 1959 contracts, which entity the respondents on May 20th, and May 27th, ceased to recognize and which, as the Board found, was never defunct, but continued on irrespective of the appellation UMD or Independent.

Patently in the posture of this case, absent the presence of the Administrator or trustee organization by virtue of its invalidity, there could not and as a matter of law was not any basis for conflicting claims, nor rival unions, a situation comparable to two of this Local's previous disaffiliations when the Local first changed its affiliation from the United Mine Workers to a Federated Local of the AFL and then from the AFL to the United Marine Division, National Maritime Union, both upon votes of the members at singular meetings, without appropriate notice, and attended by only a mere handful of its members. In each of the said instances the respondents continued their recognition of the Local Union as a continuation of the same entity.

The above issue constitutes an interplay of the provisions of the National Labor Relations Act (Appendix A, pp. 21-22) with that of the Labor Management Reporting and Disclosure Act (Appendix A, pp. 22-24). Such issue is not of first impression before this Court and is most novel and of extreme importance concerning the administration of the affairs of labor organizations with substantial impact upon labor management relations.

CONCLUSION

For the above reasons the petition for a writ of certiorari should be granted and the decision of the Court of Appeals for the Second Circuit reversed or at least this matter should be set down for argument.

Respectfully submitted,

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HOWARD SCHULMAN,
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December, 1962.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Secs. 151, et seq.), are as follows:

Unfair Labor Practices

Sec. 8(a). It shall be an unfair labor practice for an employer:

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents:

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the rights of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

* * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membershp.

REPRESENTATIVES AND ELECTIONS

Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employments: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise: * * *

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The relevant provisions of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 531, 29 U. S. C. 462) are as follows:

Sec. 2. DECLARATION OF FINDINGS, PURPOSES AND POLICY

(a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection;

that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

Sec. 302. Purposes for Which a Trusteeship May Be Established

Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and by-laws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 389-91—September Term, 1961.

(Argued June 14, 1962 Decided July 31, 1962.)

Docket Nos. 27544, 27550, 27560

HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

GALLAGHER BROS. SAND & GRAVEL CORP., BILKAY HOLDING CORP., HAMPTON SCOWS, INC., NEPTUNE LINE, INC., and ROCKVILLE SCOWS, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CHARLES J. KING and DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION, AFL-CIO,

Respondents.

Before:

FRIENDLY, KAUFMAN and HAYS, *Circuit Judges.*

Petitions to set aside certain orders of the National Labor Relations Board based upon findings of violation of the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* The Board seeks enforcement of these and another order.

Orders set aside; enforcement denied.

ROMAN BECK of Krisel, Beck & Taylor, New York, N. Y. (Arthur Karger, of counsel, on the brief, *for petitioners Harbor Carriers of the Port of New York.*

CHRISTOPHER E. HECKMAN of Foley & Martin, New York, New York (James S. Reardon, of counsel, on the brief), *for petitioners Gallagher Bros. Sand & Gravel Corp., Bilkay Holding Corp., Hampton Scows, Inc., Neptune Line, Inc., and Rockville Scows, Inc.*

RICHARD L. NEWMAN of Kanner, Hannan & Newman, New York, N. Y. (William J. Hannan, of counsel, on the brief), *for respondent Deck Scow Captains, Local 335, United Marine Division, National Maritime Union, AFL-CIO.*

MELVIN J. WELLES, Attorney, National Labor Relations Board, Washington, D. C. (Stuart Rothman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Elliott Moore, Attorney, on the brief), *for petitioner-respondent National Labor Relations Board.*

HOWARD SCHULMAN, New York, New York, *for intervenor, Deck Scow Captains, Local 335, Independent.*

HAYS, *Circuit Judge*:

The petitioners, an employers' association and certain individual employers, seek review of orders entered against them by the National Labor Relations Board and based upon that Board's finding of violations of the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* (1958). We hold that the orders must be set aside.

For a number of years the employers have had collective bargaining agreements with Deck Scow Captains Local 335, United Marine Division, National Maritime Union, AFL-CIO, as representatives of their employees working on scows.[1] The most recent of these agreements was executed in 1959 for a period to end on March 31, 1961.

At a membership meeting of Local 335 held on May 15, 1960, a motion was adopted providing for a special meeting to be held on May 29, 1960 for the purpose of discussing the disaffiliation of Local 335 from the United Marine Division of the National Maritime Union.

At the meeting which was held on May 29 "about" 130 of those in attendance voted for disaffiliation and "about" 14 against. The Local had at that time approximately 750 members.

In the meantime on May 20 the United Marine Division designated a "temporary administrator" of the affairs of Local 335 and wrote to the employers advising them to deal with the administrator on all matters concerning the collective agreement. This same advice was repeated in response to a telephone call from an employer representative on May 27 or shortly thereafter. In fact at all times since these dates representatives claiming to act for Local 335, United Marine Division, have continued to demand that the employers observe the terms of the collective agreement. The employers, on their side, have acceded to these demands and have recognized and dealt with that Local.

After the disaffiliation vote of May 29, representatives claiming to act for "Local 335, Independent" also wrote to the employers informing them of the action which had been taken and from time to time thereafter demanded that the employers deal with that Local. The employers refused to do so and continued to bargain with Local 335, United Marine Division.

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[1] As each scow has only one employee there is no question of the scow captains being "supervisors" and thus exempted from the operation of the Act, § 14(a), 29 U. S. C. § 164(a) (1958).

It is the employers' refusal to deal with Local 335, Independent, which is the gravamen of the Board's complaint. (Section 8(a)(5), 29 U. S. C. § 158(a)(5).) The other charges which the Board sustained, and the resulting orders, are all based upon the charge of refusal to bargain. Since if that charge falls the rest must follow, we shall deal only with the charge of refusal to bargain.

The employees involved were represented by Local 335, United Marine Division, prior to May, 1960 and the employers were required by the Act to bargain with that Local as the representative of their employees. The only means provided by the Act for effecting a change of representatives is through a Board-conducted election by secret ballot. Section 9(e), 29 U. S. C. § 159(e). It is apparently assumed by the Board, and we accept the assumption, that in the absence of such an election the employer was required to continue to bargain with the representatives "currently recognized." (Section 9(c)(1)(A), 29 U. S. C. § 159(c)(1)(A).)

The Board concedes the correctness of these propositions but seeks to escape their consequences by holding that Local 335, Independent, was a continuation of Local 335, United Marine Division, and that therefore no change in bargaining representatives took place. The decision thus turns entirely upon the correctness of the finding that Local 335, Independent, is, under a new name, the same organization as Local 335, United Marine Division.

Unless it is established that Local 335, Independent, is the same organization as Local 335, United Marine Division, the employers would be required by the Board's familiar contract bar doctrine[2] to continue to deal with Local 335, United Marine Division, during the period of the contracts

[2] For a discussion of the contract bar doctrine, including a consideration of legislative history, see Judge Friendly's opinion in *Local 1545, United Bhd. of Carpenters* v. *Vincent*, 286 F. 2d 127 (2d Cir. 1960).

with that organization.[3] Far from being required to recognize and bargain with Local 335, Independent, the employers would commit an unfair labor practice if they did so while the contracts with Local 335, United Marine Division, were still in force. And this would be true even if there was evidence which clearly established that Local 335, United Marine Division, had been repudiated by a majority of the employees and that a majority wished to be represented by Local 335, Independent.[4] Thus the issue in the present case is not whether a majority of the employees wished to have Local 335, Independent, rather than Local 335, United Marine Division, as their representative. Even if the evidence could be said to establish that they did, the employers would still have been required to bargain with Local 335, United Marine Division.

It is true that the Board claims that the application or waiver of the contract bar rule is a matter of discretion for the Board to determine and that it "may be applied or waived as the facts in a given case may require in the interests of effectuating the policies of the Act" [5] and that this position has been approved by the courts.[6] In the present

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[3] The contract bar doctrine applies although the union involved is not certified by the Board. See *Asplundh Tree Expert Co.*, 92 N. L. R. B. 1013 (1950); *United States Time Corp.*, 79 N. L. R. B. 1135 (1948).

[4] *N. L. R. B.* v. *Marcus Trucking Co.*, 286 F. 2d 583 (2d Cir. 1961). The same result has been reached under the one-year certification rule, the purpose and effect of which are identical. See *Brooks* v. *N. L. R. B.*, 348 U. S. 96 (1954); *Carpinteria Lemon Ass'n* v. *N. L. R. B.*, 240 F. 2d 554 (9th Cir. 1956), cert. denied, 354 U. S. 909 (1957); *N. L. R. B.* v. *Henry Heide, Inc.*, 219 F. 2d 46 (2d Cir.), cert. denied, 349 U. S. 952 (1955); *N. L. R. B.* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541 (2d Cir.), cert. denied, 323 U. S. 714 (1944).

[5] *Hershey Chocolate Co.*, 121 N. L. R. B. 901, 905 (1958). See *Ford Motor Co.*, 95 N. L. R. B. 932, 934 (1951).

[6] See *N. L. R. B.* v. *Grace Co.*, 184 F. 2d 126, 129 (8th Cir. 1950); *Local 1545, United Bhd. of Carpenters* v. *Vincent*, 286 F. 2d 127, 131 (2d Cir. 1960). But cf. *Fay* v. *Douds*, 172 F. 2d 720, 724 (2d Cir. 1949) ("* * * we assume that the 'contract bar' is, as it were, written into the statute * * *").

case the Board did not purport to waive the contract bar rule, nor is there any indication that such a waiver would effectuate the policies of the Act. Moreover, the accepted significance of waiver of the contract bar rule, is that an election will be held for the purpose of choosing between the old and a new representative, not that the employer will be guilty of an unfair labor practice for refusing to bargain with a new organization claiming the right to represent.[7] In fact it would be entirely arbitrary and unreasonable for the Board, waiving the contract bar rule for the purposes of this case, to hold the employers guilty of an unfair labor practice for bargaining with the union with which they had contracts and with which, therefore, they had every reason to believe that they were required to bargain.

But if, in spite of these considerations, it could be held that the Board exercised its discretion to waive the contract bar rule, the Board would still not be justified, absent an election, in finding the employers guilty of refusing to bargain with a new representative unless that finding was based upon evidence that the employers did not have a "good faith doubt" that the new organization represented a majority of the employees. *N. L. R. B.* v. *Philamon Labs.*, 298 F. 2d 176, 179 (2d Cir. 1962); *N. L. R. B.* v. *Jackson Press, Inc.*, 201 F. 2d 541, 544 (7th Cir. 1953). In the present case, not only did Local 335, Independent, fail to present any adequate evidence of majority representation, but there is no finding as to good faith since the Trial Examiner, whose findings, conclusions and recommendations were adopted by the Board, refused to pass upon that issue, stating that the employers' "motives or good faith are not material."

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[7] See Mayer, A House Divided—The Schism Doctrine, 22 Ohio St. L. J. 154 (1961); Naumoff, An Analysis of the Contract Bar Doctrine, 7 Lab. L. J. 197, 227 (1956); Note, The Schism Doctrine, 45 Va. L. Rev. 211 (1959); Note, Employee Repudiation of Bargaining Representatives: An Appraisal of Existing Restrictions, 66 Yale L. J. 223, 232 (1956), and numerous Board cases cited in these articles.

Thus it is clear that support for the Board's conclusion, if it has any basis in law, must rest solely and entirely on the finding that Local 335, Independent, was a continuation under a new name of Local 335, United Marine Division, and not a new organization claiming the right to represent the employees.

In examining the evidence on which the Trial Examiner reached his conclusion, we will accept his premise that a mere change in a labor organization's name or affiliation will not serve to change the identity of that organization. If the members of Local 335, United Marine Division, merely determined to change the name of that organization and to disaffiliate from the United Marine Division there would be reasonable ground for holding that the new organization was only a continuation of the old and that the employers must continue to bargain with that organization. If, however, some of the members of the Local, even a majority of them,[8] decided to withdraw from the Local and to form a new organization, the employers, under the principles already discussed, would be required to continue to bargain with the organization with which they had contracted, at least until the Board ordered a new election, or, if the contract bar rule were "waived," until the new organization presented proof which would dispel any good faith doubt of its majority support.

What is the evidence on which the Trial Examiner relied as establishing that the Local continued as the same organization rather than that a new organization was formed by the withdrawal of some of the members of the old Local? The focal point is the vote at the meeting of May 29 together with subsequent "ratification." But the May 29 vote can establish at most only that "about" 130 members out of a

[8] Where only five percent of the members remained loyal to the old organization the Board held that the organization continued to be the bargaining representative. *Montgomery Ward Co.*, 68 N. L. R. B. 369, 372, n. 3 (1946). See also *Great Lakes Carbon Corp.*, 44 N. L. R. B. 70, 72, n. 1 (1942) (same where one-third of the members remained loyal).

total of about 750 wished to disaffiliate from the United Marine Division (and that "about" 14 did not).[9] Of this vote the Trial Examiner said:

> "Taking into consideration the peculiar nature of the industry, as described above, and the facts as to the meeting of May 29, in particular, I conclude that the vote there taken was not, standing alone, fairly representative of the wishes of the majority of the local's members, a substantial portion of whom were in effect disenfranchised."

Keeping in mind that the issue is not whether a substantial part of the membership wished to withdraw from the Local and form a new organization, but whether the old organization merely changed its name and affiliation, what is to be said of the subsequent "ratification" of this disaffiliation vote? The Trial Examiner finds that the vote was ratified by "a substantial majority of the employees" by the fact that "approximately" 500 signed cards "accepting the affiliation of Local 335, Independent, with the S.I.U. [Seafarer's International Union]" and "an approximately equal number" signed up for strike duty in July.

On June 19, 1960 there was a membership meeting at which a vote was taken on affiliation with the Seafarer's International Union. The vote was 160 to 5 in favor of such affiliation. The evidence as to the "acceptance" of this affiliation was as follows:

> "Q. Did you submit to the membership at large by means of any referendum the question of ratification of the acceptance of the SIU charter by mail ballot, to be specific? A. No. We didn't have no referendum. We had 500 cards that they signed to accept and stay in the SIU.

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[9] In *Hershey Chocolate Co.*, 121 N. L. R. B. 901 (1958), where the vote for disaffiliation was 829 to 1, the board did not recognize the new union as the successor to the old, but ordered an election to permit the employees to choose between the two organizations.

Q. I thought you said you didn't issue new cards. A. That was the membership wished. If they wished to stay in the SIU.

Q. Just explain that a little to me a little more fully. I don't understand.

Trial Examiner: I am puzzled, too.

Q. About these 500 cards. Who signed the cards? A. The membership.

Q. Where were they signed? A. On barges. At the hall.

Q. Who presented them for signature? A. The delegate. Myself and the Executive Board.

Q. Were these cards: you say are all dated and signed after the affiliation? A. These cards are signed during the affiliation and why we were affiliated.

Trial Examiner: When you say 'affiliation,' you mean after the issuance of the charter?

Mr. Beck: Right."

Even if this rather informal evidence is to be accepted, and even if we were to assume that a vote of majority to disaffiliate from one organization and to join another establishes that the new organization is a continuation of the old, there is no evidence whatever as to the form or content of the cards which the employees are alleged to have signed. Contrary to the finding of the Trial Examiner, the evidence establishes that the employees by signing the cards were not "ratifying" the vote on disaffiliation. The cards referred to a completely different matter, *i.e.*, affiliation with the Seafarer's. For all that appears a large number of the signers may have preferred not to disaffiliate from the United Marine Division, but, if such disaffiliation was inevitable, then and only then to affiliate with the Seafarer's.[10]

The fact that "approximately" 500 employees signed up for strike duty in July is equally unconvincing as ratifica-

[10] Employees frequently sign authorization cards in more than one union. See *Save Elec. Corp.*, 49 N. L. R. B. 1030, 1034 (1943).

tion of the disaffiliation vote taken two months before. The strike did not have as its object recognition or bargaining with the new organization but was occasioned by the discharge of some of the employees. Moreover, willingness to support such a strike could at best suggest majority support for the new organization. It does not tend to establish that the new organization is a continuation of the old.

Defection of officers and seizure of assets are by no means indications that the old organization is continued in the new. Officers are more likely to lead secession movements than are the rank and file, and it may well be that members are unduly influenced in their choice of whether to remain with the old organization or to join the secessionists by reason of the consideration of which group controls the assets. See *Kearney & Trecker Corp.* v. *N. L. R. B.*, 210 F. 2d 852, 857-58 (7th Cir.), cert. denied, 348 U. S. 824 (1954). In the present case, moreover, the president, vice-president and one of the trustees apparently did not join the secession but resigned their offices. Of the two paid officers, it appears that one remained loyal to the old union and was appointed administrator of its affairs, while the other associated himself with the new organization.

The procedure of disaffiliation did not accord with the requirements of the union constitution, but it is not necessary in this case for us to pass upon the Board's position that it will not consider in situations of this kind the legality of disaffiliation under the provisions of the union constitution. (See *Hershey Chocolate Corp.*, 121 N. L. R. B. 901, 905-06 (1958); *Radionic Prod. Div.*, 91 N. L. R. B. 595 (1950); *Brightwater Paper Co.*, 54 N. L. R. B. 1102, 1106 (1944). But see *M & M Wood Working Co.* v. *N. L. R. B.*, 101 F. 2d 938, 941 (9th Cir. 1939); *Douglas and Lomason Co.*, 34 N. L. R. B. 69 (1941).) Even if the Board is right on this point, it seems clear that the withdrawal of members in the present case created a new organization.

The old organization did not disappear or become "defunct." It continued to function actively under the administration of one of its paid officials, who had been "dis-

charged" by the new secretary-treasurer, the leader, apparently, of the secession movement. Promptly after the secession began it claimed to be the rightful holder of the contract and from its new headquarters it administered the contract to the extent it was permitted to do so.[11] So far as we can tell from the evidence it may have had the support of anywhere from 14 to over 600 of the members. Only an election could have resolved that question.

The court decisions cited by the Trial Examiner in support of the proposition that a mere change in name or affiliation does not change the identity of a contracting organization [12] are all distinguishable.[13] In none of these cases were there two unions claiming bargaining rights. In none of them was there any secession movement from an existing organization. In *Carpinteria*, the C. I. O. which had directly chartered the local involved suggested that it become a local of one of the CIO-affiliated internationals. The members voted unanimously to do so. In *Harris-Woodson Co.*, the union was prevented from taking advantage of the Board's aid by the failure of the C. I. O. to file the then required affidavits. It thereupon changed its affiliation so that the employer could be ordered to bargain with it. (For the Board's own comment on the *Harris-Woodson* case, see quotation from *Sears Roebuck & Co.*, 110 N. L. R. B. 226 (1954), *infra.*) In *Continental Oil*, the international with which the

[11] For a case in which the Board refused to hold an election to determine representatives where the old union was willing to administer the contract, see *Youngstown Steel Door Co.*, 116 N. L. R. B. 986 (1956).

[12] *N. L. R. B.* v. *Weyerhaeuser Co.*, 276 F. 2d 865 (7th Cir.), cert. denied, 364 U. S. 879 (1960); *Carpinteria Lemon Ass'n* v. *N. L. R. B.*, 240 F. 2d 554, 557 (9th Cir. 1956), cert. denied, 354 U. S. 909 (1957); *N. L. R. B.* v. *Harris-Woodson Co.*, 179 F. 2d 720, 723 (4th Cir. 1960); *Continental Oil Co.* v. *N. L. R. B.*, 113 F. 2d 473, 477-8 (10th Cir. 1940), remanded on other grounds, 313 U. S. 212 (1941).

[13] In *Dickey* v. *N. L. R. B.*, 217 F. 2d 652 (6th Cir. 1954), and *M & M Wood Working Co.* v. *N. L. R. B.*, 101 F. 2d 938 (9th Cir. 1939), the Board's finding that a new organization was but a continuation of the old was set aside.

union was affiliated changed its name and its affiliation from A. F. L. to C. I. O. In *Weyerhaeuser*, the international with which the union was affiliated disaffiliated from the A. F. L.-C. I. O. It is, of course, perfectly clear in all these cases that the employers could not refuse to bargain on the ground of change of identity.

The Trial Examiner also cited a number of Board cases.[14] Of these one, *Lenscraft*, appears to be contra to the proposition for which it is cited. In most of the others there was no claim by a second union.[15] Three of the remaining did not involve a refusal to bargain.[16] To the extent that any of these Board cases afford support for the proposition for which they are cited we find them inconsistent with other Board cases, with the cases decided by the courts, and with the accepted principles which we have discussed.

The situation presented in the present case appears to us to be analogous to that with which the Board dealt in *Sears Roebuck and Company, supra*, where the Board said (at pp. 228-229):

> "[The General Counsel] argues, and the Trial Examiner has found, that the present situation is governed by the *Harris-Woodson* case, in that the Retail Clerks 'was the same as, or the successor' to the certified unaffiliated Council, and that the Respondent was therefore obligated to bargain with the former

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[14] *Lenscraft Optical Corp.*, 128 N. L. R. B. 836 (1960); *Alto Plastics Mfg. Corp.*, 119 N. L. R. B. 1458 (1958); *Dalmo Victor Co. Div., Textron, Inc.*, 119 N. L. R. B. 737 (1957); *Dryden Rubber Div., Sheller Mfg. Co.*, 118 N. L. R. B. 369 (1957); *R. C. Williams & Co.*, 107 N. L. R. B. 933 (1954); *Charles Beck Mach. Corp.*, 107 N. L. R. B. 874 (1954); *Prudential Ins. Co.*, 106 N. L. R. B. 237 (1953); *Louisville Ry.*, 90 N. L. R. B. 678 (1950); *Chesapeake & Potomac Tel. Co.*, 89 N. L. R. B. 231 (1950); *Michigan Bell Tel. Co.*, 85 N. L. R. B. 303 (1949).

[15] *Dalmo Victor Co. Div., Textron, Inc., supra*, note 14; *Dryden Rubber Div., Sheller Mfg. Co., supra*, note 14; *Charles Beck Mach. Corp., supra*, note 14; *Chesapeake & Potomac Tel. Co., supra*, note 14; *Michigan Bell Tel. Co., supra*, note 14.

[16] *Alto Plastics Mfg. Corp., supra*, note 14; *Prudential Ins. Co., supra*, note 14; *Louisville Ry., supra*, note 14.

organization. In the *Harris-Woodson* case, the Board found that the respondent employer had unlawfully refused to bargain with an industrial union directly affiliated with the C. I. O., and directed the employer to bargain with that union. Subsequently, the industrial union affiliated with Textile Workers Union of America, C. I. O., as the result of a vote of an overwhelming majority of the employees in the old union. Thereupon, the Textile Workers moved to substitute its name for that of the industrial union in the Board's bargaining order. The Board granted the motion, finding that, for the purposes of the bargaining order, the two organizations were the same in view of the fact that the bulk of the members and all the officers were the same. It is significant that after the change of affiliation, no organization remained which claimed to be the original labor union.

The *Harris-Woodson* doctrine must be limited to the particular facts of that case. It was not intended to be a vehicle for undermining the Board's contract-bar rule or for encouraging raids on an existing bargaining representative during the life of a valid collective-bargaining agreement. In the present case, the certified bargaining representative did not disappear after the disaffiliation action. Some but not all members shifted to the new organization; most but not all officers transferred their allegiance to the Retail Clerks. The certified unaffiliated Council continued to exist and to represent employees at the Fenway as well as at the Cambridge store. The Retail Clerks therefore stands forth not as the *alter ego* of the certified unaffiliated Council, but like any other union which, during the life of a valid bargaining contract, has succeeded in diverting to itself from the recognized bargaining representative the support of a majority of employees in the bargaining unit. As, at the time the Retail Clerks made its request for bargaining, the Respondent's contract with the unaffiliated Council still

had approximately 1 year to run, the demand created no question concerning representation. If, instead of making the demand, the Retail Clerks had filed a representation petition, the Board would have dismissed it. For the same reasons, the Respondent was free to ignore the demand and to continue dealing with the bargaining representative recognized by the outstanding collective-bargaining agreement."

We hold, then, that the Board's conclusion, on which its orders are rested, that Local 335, Independent, is merely the "*alter ego* or continuance" of Local 335, United Marine Division, is not supported by evidence in the record taken as a whole. On the contrary the situation presented appears to be a fairly typical example of the secession of part of the membership to form a new organization. Under these circumstances the employers cannot be required to bargain with the new organization until its majority status has been established.

The Board formerly designated such a situation a "schism" and, in appropriate cases, ordered an election to permit the employees to express a choice between the old and the new organizations.[17] In *Hershey Chocolate Corp., supra*, the Board placed a severe limitation on the schism doctrine by holding that it would not order an election (i.e. would require the employer to continue to deal with the old organization) unless the division in the union constituted a "true schism" which the Board defined as one arising in the context of a basic intraunion conflict at the national level. Since a division at the local level, such as we have in the present case, unconnected with a national split, may well be as destructive of the stability of labor relations in the industry as would be a division consequent upon a basic intraunion conflict, it is possible that the Board has confined its policy of allowing an election to choose new representatives to too narrow an area. It cannot, however, escape these limitations by requiring employers in schism

[17] See articles cited *supra* n. 7 and Board cases cited therein.

situations at the local level to make a choice at their peril between two rival organizations both of which claim representation.

The orders of the Board are denied enforcement and set aside.

KAUFMAN, *Circuit Judge* (dissenting):

I disagree with the majority's conclusion that the charging party in these proceedings was not the bargaining representative with whom petitioners were required to deal at all times in the period under consideration. As the majority points out, the so-called disaffiliation vote was not taken until May 29, 1960. Petitioners, however, refused to deal with the local's business agent before the May 29 vote; and on May 27, they accorded exclusive recognition to a "temporary administrator" whose credentials they conveniently failed to investigate.[1] Nor is there any doubt in my mind that Local 335, Independent, was in fact and in substance a continuation of the Local 335 that entered into the collective bargaining contracts involved in this case. The "Local 335" governed by the "temporary administrator" was clearly nothing more than a "paper local," and petitioners could not possibly entertain any good faith doubt that the deck scow captains belonged to the "Independent." Any doubt they may have had was surely dissipated by a strike which forced them to re-hire employees who had been discharged because they refused to join the "temporary administrator's" paper local. Therefore, the inadequacy of the May 29 disaffiliation vote is immaterial, since at no time was there any local which could enforce the employees' rights under the existing collective agreement but the charging party—by any name. Because of this, and the complete lack of merit which I find in the petitioner's remaining arguments, I would affirm and enforce the order of the Board.

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[1] The Board did not find that the "temporary administrator" had any authority to take over the affairs of the local, and petitioners do not argue on appeal that the purported "trusteeship" was lawful or proper.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 27,544

HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS LISTED IN APPENDIX "A",

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 27,550

GALLAGHER BROS. SAND & GRAVEL CORP., BILKAY HOLDING CORP., HAMPTON SCOWS, INC., NEPTUNE LINE, INC., and ROCKVILLE SCOWS, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 27,560

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CHARLES J. KING and DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION, AFL-CIO,

Respondents.

PETITION FOR REHEARING BY INTERVENOR DECK SCOW CAPTAINS LOCAL 335, INDEPENDENT

HOWARD SCHULMAN, New York, New York, for Intervenor.

Petition for rehearing denied.

20 September 1962.

H. J. F.,
P. R. H.,
I. R. K.,
U. S. C. JJ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS LISTED IN APPENDIX "A",

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

GALLAGHER BROS. SAND & GRAVEL CORP., BILKAY HOLDING CORP., HAMPTON SCOWS, INC., NEPTUNE LINE, INC., and ROCKVILLE SCOWS, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CHARLES J. KING and DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION, AFL-CIO,

Respondents.

PETITION FOR REHEARING IN BANC

HOWARD SCHULMAN, New York, N. Y., for intervenor Deck Scow Captains Local 335, Independent.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD,
Chief Judge.

1 October, 1962.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 700

HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS,

v.

NATIONAL LABOR RELATIONS BOARD.

GALLAGHER BROS. SAND & GRAVEL CORP., BILKAY HOLDING CORP., HAMPTON SCOWS, INC., NEPTUNE LINE, INC. and ROCKVILLE SCOWS, INC.,

v.

NATIONAL LABOR RELATIONS BOARD.

NATIONAL LABOR RELATIONS BOARD,

v.

CHARLES J. KING and DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION, AFL-CIO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS, IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1962

No. 700

HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS,

v.

NATIONAL LABOR RELATIONS BOARD.

GALLAGHER BROS. SAND & GRAVEL CORP., BILKAY HOLDING CORP., HAMPTON SCOWS, INC., NEPTUNE LINE, INC. and ROCKVILLE SCOWS, INC.,

v.

NATIONAL LABOR RELATIONS BOARD.

NATIONAL LABOR RELATIONS BOARD,

v.

CHARLES J. KING and DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION, AFL-CIO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS, IN OPPOSITION *

Opinions Below

The opinions of the court below (App. B of Pet.) are reported at 306 F. 2d 89. The findings of fact, conclusions

* This brief in opposition is also submitted on behalf of the following members of Harbor Carriers of the Port of New York, which filed their separate petition for review of the Board's order in the court below: Gallagher Bros. Sand & Gravel Corp., Bilkay Holding Corp., Hampton Scows, Inc., Neptune Line, Inc. and Rockville Scows, Inc.

of law and order of the National Labor Relations Board (herein "the Board") (Record, Vol. III, pp. 5a-77a) are reported at 136 NLRB No. 79. The orders of the court below denying the petition for rehearing (App. B of Pet., pp. 40-41) are not reported.*

Jurisdiction

The Board itself has not challenged the decree of the court below, either by petition to that court for rehearing or by petition to this court for a writ of certiorari. That has been done only by the petitioning union herein, which was the charging party before the Board and which has sought to invoke this Court's jurisdiction under 28 U. S. C., Section 1254(1). Respondent employers challenge the standing of that union to petition for certiorari.

Statutes Involved

In addition to the statutes set forth in Appendix A to the petition here (pp. 21-24), another statutory provision involved herein is Section 603(b) of the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 540, 29 U. S. C., § 523(b)), which is set forth in Appendix A of this brief.

Questions Presented

1. Whether the charging party before the Board, which was merely granted leave by the court below to submit a brief and argue in support of the Board's position in seek-

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* The Board adopted the findings, conclusions and recommendations of its Trial Examiner in their entirety. The Examiner's findings are accordingly referred to in this brief interchangeably as those of the Board as well as of the Examiner. The symbols "App. B. of Pet." refer to Appendix B of the petition for certiorari herein. Figures in parentheses preceded by the symbols "H.C. App." refer to the pages of the Appendix to the brief of respondents, Harbor Carriers in the court below (Record, Vol. III). Figures in parentheses preceded by the letter "T." refer to the pages of the stenographic transcript of the testimony taken before the Examiner.

ing to enforce its order, has standing to petition this Court for certiorari to review the decree of the court below denying enforcement of that order, when the Board itself has not petitioned for certiorari.

2. Whether the court below "misapprehended" or "grossly misapplied" the controlling standards of judicial review laid down by this Court in *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488, 491.

3. Whether the question attempted to be raised by the petitioner, as to the alleged invalidity of the parent union's appointment of a "trustee" for the local union to which the petitioning union claims to be the successor in interest, is properly before this Court, when the Board itself, whose order the petitioning union is here seeking to enforce, held that that question was irrelevant to the issues presented.

Statement

The respondent-employers comprise the members of an association known as Harbor Carriers of the Port of New York, and certain individual employers, who own and operate deck scows in the New York Harbor area. For many years, the employers had collective bargaining agreements with a local union representing the employees working on such scows, who are known as scow captains. That local union is affiliated with the United Marine Division of the National Maritime Union, AFL-CIO, and is known as Deck Scow Captains Local 335, UMD, NMU, AFL-CIO (herein "Local 335, UMD"). The agreements in effect during the period involved herein were for the term from May 1, 1959 to March 31, 1961 (H.C. App. 18a-19a).

Because of the peculiar nature of the industry, as found by the Board, it was either impossible or extremely difficult for all or substantially all of the scow captains to attend a meeting of the local on any one day (H.C. App. 33a-35a). The local's constitution thus provided that on such important matters as the election of officers and the adoption of amendments to the constitution, there was to be balloting over a period of approximately fifteen days (G.C., Exh. 2N, Arts. IX and XIV; H.C. App. 34a).

At a membership meeting of Local 335, UMD held on April 3, 1960, attended by about 100 members (T. 1066), a motion was adopted to hold a mail referendum among the local's membership under the auspices of the Honest Ballot Association, on whether Local 335, UMD should merge with its sister Local 333, UMD, which represented the men employed on the tugs used to tow the deck scows (H.C. App. 20a). In spite of that mandate, however, at a later meeting on April 18, 1960, attended by only 27 men (T. 136-8; H.C. App. 78a), the motion to hold the referendum on the proposed merger was rescinded (H.C. App. 20a).

At a subsequent membership meeting held on May 15, 1960, the resignation of Hugo Kasten, who had for many years been the local's secretary-treasurer, was accepted, and Thomas M. Wilhelm was elected secretary-treasurer for the balance of Kasten's term (H.C. App. 20a-21a). Kasten's election did not comply with the fifteen-day balloting requirements of the local's constitution. At the same meeting, a motion was adopted to hold a special meeting on May 29 to vote on the question of the local's disaffiliation from the UMD and the NMU (H.C. App. 21a).

A number of other changes in the local's leadership occurred during the few weeks preceding the meeting of May 29. The local's president and vice-president and one of its trustees resigned, and the executive board decided not to fill those vacancies until the next regular election in October (H.C. App. 23a). Since there was another inactive trustee, who had been confined to the hospital for many years, the result was that the local was left with an executive board of less than the five members requisite under the local's constitution to constitute a quorum (H.C. App. 80a-81a).

In addition to the secretary-treasurer, the only paid personnel of the local were David Graham, its delegate, and Thomas Anglim, who maintained the local's records, ran its hiring hall, and collected dues (T. 100-101, 719). On May 17, Wilhelm discharged Anglim (H.C. App. 21a). On May 20, the UMD appointed Anglim as temporary administrator for the local and wrote to the employers advising

them to deal with the administrator on all matters concerning the collective agreements (H.C. App. 21a-22a).

The special membership meeting of May 29 was attended by approximately 20% of the membership—*i.e.*, by 138 to 154 members in good standing out of a total membership of between 700 and 750 (H.C. App. 35a). The Board itself found that a substantial number of the local's members were unable to attend the May 29 meeting and that "Because of the nature of the industry * * * a genuine opportunity to vote could have been accorded only by a means of mail ballot, or balloting spread out over a reasonable period of time" (H.C. App. 35a, fn. 35). A resolution was nevertheless submitted at that meeting, and was adopted by a vote of from 130 to 140 in favor, and 8 to 14 opposed, to effect an immediate disaffiliation from the UMD and the formation of a new local, to which the existing contracts and the assets and records of the original local were to be transferred, and which was to seek a new affiliation with an international union (H.C. App. 24a).

Both the new local thus formed—Deck Scow Captains Local 335, Independent (herein called "Independent")—and the original contracting union—Local 335 UMD, acting through its administrator—then made conflicting demands upon the employers, each claiming to be entitled to administer the existing contracts as the contracting local. The employers decided that they would abide by all the substantive provisions of the contract, but to protect their employees from pressures which they feared both factions would exert, they would refrain in hiring scow captains from calling upon either union's hiring hall (H.C. App. 25a). The Board found no violation of the Act in this conduct (H.C. App. 63a). The Board found further that because of its contract bar rule a Board-conducted election was not available to the employers for the resolution of their dilemma during the term of the existing contracts with Local 335, UMD (H.C. App. 32a). Under the circumstances, the employers declined Independent's requests for a meeting and advised that local that their contract was with Local 335, UMD, and that they recognized that contract (H.C. App. 26a).

On June 19, 1960, Independent, led by Wilhelm, called a meeting attended by some 165 men, at which a resolution was adopted in favor of becoming a chartered local of the Seafarers International Union (herein "S.I.U.") (H.C. App. 28a). The new local thereupon operated as an affiliate of the S.I.U. until the S.I.U. charter was withdrawn in September 1960.

As respects the crucial disaffiliation action taken at the meeting of May 29th, on the basis of which Independent was formed, the Board adopted the following finding made by the Examiner (H.C. App. 35a):

> "Taking into consideration the peculiar nature of the industry, as described above, and the facts as to the meeting of May 29, in particular, I conclude that the vote there taken was not, standing alone, fairly representative of the wishes of the majority of the local's members, a substantial portion of whom were in effect disenfranchised."

The same considerations were equally applicable to the vote at the meeting of June 19th to accept a charter from the S.I.U., and the Board placed no operative significance on that meeting.

The Board held, however, that the abortive disaffiliation action of May 29th was thereafter ratified by a majority of the members when "approximately 500 deck scow captains out of a total of about 750 signed cards accepting the affiliation of Local 335, Independent, with the S.I.U. and an approximately equal number signed up for strike duty in July" (H.C. App. 36a).

No claim of ratification was advanced by the Board's general counsel either in the complaint or at the hearing before the Examiner. Neither the S.I.U. cards nor the list of those who had signed up for strike duty was produced at the hearing, and the employers' request for production of the latter list was denied by the Examiner (H.C. App. 86a-87a). The evidence on this subject consisted only of the unsubstantiated testimony of Wilhelm and of Nappo, the strike chairman.

The record does not reveal the exact nature or contents of the S.I.U. cards referred to by the Examiner, or the exact time or times when, or the circumstances under which, they were signed. Wilhelm's testimony was simply that "we had 500 cards that they signed to accept and stay in the S.I.U." (H.C. App. 79a). The supposed cards were in no way further identified, and Wilhelm testified that no new membership cards were issued (H.C. App. 79a). As regards the time of signing, all that the record showed was that the cards were signed at various times between the issuance of the S.I.U. charter in June 1960 and its withdrawal in September 1960 (H.C. App. 79a). Nappo's testimony with regard to the signing up for picket duty was simply that between July 18 and July 24 or 25, 1960, he signed up "close to 500 people for picket duty" (H.C. App. 84a-86a).

The gravamen of the Board's complaint was the employers' refusal to deal with Independent. (Nat. Lab. Rel. Act, § 8(a)(5); 29 U. S. C. § 158(a)(5).) The Board's decision was predicated solely on its finding that Independent was from and after May 29, 1960 "the *alter ego* or continuance" of the original contracting local (H.C. App. 37a-38a). The other charges sustained by the Board related to the conduct of two of the employers in having yielded to the demand of Local 335, UMD for the enforcement of the union security clause in the contracts by the lay-off for a brief period of three employees (H.C. App. 65a-66a). Those charges were all predicated on the primary charge of the employers' refusal to bargain with Independent.

The strike to which the Board made reference was called against two of the 29 employers, and lasted from July 20 to July 25, 1960 (H.C. App. 28a-29a).

By an offer of proof which the Board rejected as immaterial (H.C. App. 87a-93a), the employers attempted to show that when the strike began, officials of the NMU and the S.I.U. intervened in order to resolve the dispute over

recognition; that an agreement was reached on behalf of both competing unions that the strike should be terminated and all the employees should return to work without discrimination and that the question of recognition should be submitted for final disposition to AFL-CIO president George Meany. The strike settlement was carried out and the men went back to work. President Meany thereafter decided that the secession of the Wilhelm group, followed so quickly by the issuance of the S.I.U. charter, was a breach by the S.I.U. of the "no-raiding" provisions of the AFL-CIO constitution, and he accordingly ordered the S.I.U. charter to be withdrawn. The S.I.U. complied and withdrew the charter in September 1960 (H.C. App. 29a), but the Wilhelm group did not return to Local 335 UMD, as the Meany decision contemplated.

ARGUMENT

I

Independent Has No Standing to Invoke the Jurisdiction of This Court

The Board did not seek rehearing in the court below and has not seen fit to petition this Court for certiorari, though its time to do so has long since elapsed. Independent, the petitioner herein, has never been a party to these proceedings and has no standing to invoke this Court's jurisdiction. While Independent moved in the court below for leave to intervene as a party in the proceedings, that motion was opposed by the Board itself, which suggested that Independent be granted merely leave to file a brief as *amicus curiae*. The court below, by order dated May 21, 1962, did not grant Independent leave to intervene, but merely gave it permission to file a brief, with leave to ask the court on the argument of the appeal for permission to argue. (See Motion to Intervene, Affidavit in Opposition, and Order of Court of Appeals, dated May 21, 1962, submitted by petitioner as part of the record herein.)

Apart from petitioner's lack of status as a "party" (28 U. S. C. § 1254(1)), it is in any event without standing to seek review by this Court for the purpose of securing enforcement of the Board's order. It is thus settled that under the scheme of the National Labor Relations Act, the Board alone—as distinguished from "any private person or group * * * or any employee or group of employees"—"is authorized to take proceedings to enforce" its order. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265-6.

In *Amalgamated Utility Workers, supra*, the union which had been the charging party before the Board, was permitted to intervene before the Court of Appeals in the Board's proceedings to enforce its order. That union was also heard in this Court in the certiorari proceedings for review of the Court of Appeals' decree of enforcement. Following this Court's modification of that decree, the union initiated a proceeding before the Court of Appeals to have the employers adjudged in contempt for failure to comply with the decree. The Board, though not a moving party, asserted its willingness to participate in an investigation to ascertain whether the decree had been violated. The Court of Appeals denied the union's application on the ground that it had no standing to press a charge of civil contempt. This Court unanimously affirmed that determination, in an opinion by the late Chief Justice Hughes.

On the basis of a careful analysis of the Act, Justice Hughes concluded that the Board alone was vested with exclusive authority, not only to initiate and prosecute the administrative proceedings culminating in its order, but also to initiate and prosecute any proceedings for judicial enforcement of that order or for punishment of violations of the judicial decree of enforcement. He thus stated (309 U. S. at 270):

> "As the court has no jurisdiction to enforce the order at the suit of any private person or group of persons, we think it is clear that the court cannot entertain a petition for violation of its decree of enforcement save as the Board presents it."

Justice Hughes observed that "The Board seeks enforcement as a public agent, not to give effect to a 'private administrative remedy'" (p. 269).

Justice Hughes emphasized that the remedy afforded by section 10(f) of the Act to a person aggrieved by the Board's order was simply "an opportunity afforded to *contest* a final order of the Board, not to *enforce* it" (p. 266). The "proceeding under § 10 (f)", he noted, "seeks not to require compliance with the Board's order but to overturn it" (p. 266).

While this Court has held that its certiorari jurisdiction may be invoked by a union which had been granted leave by the court below to intervene in support of proceedings initiated by the Board to secure a modification of its order as judicially enforced (*International Union* v. *Eagle-Picher Co.*, 325 U. S. 335, 338-9), that decision is merely an application of Justice Hughes' differentiation between the contesting and the enforcement of Board orders. The proceedings for modification in *International Union*, *supra*, thus actually sought to *contest* and *overturn* a portion of the Board's order (cf. the Court's citation in support of its ruling, 325 U. S. at 339, fn. 7, of *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 218, a case involving the *contesting* of a Board order). Where, on the other hand, as here, the petitioning union's purpose in invoking this Court's jurisdiction is to secure *enforcement* of the Board's order, it is clear that it has no standing therefor. See *International Union* v. *Eagle-Picher Co.*, *supra*, 325 U. S. at 338-9, fn. 6, reaffirming the principle of *Amalgamated Utility Workers*.

The principle of *Amalgamated Utility Workers* applies with even greater force in the case at bar, since, as noted above, the petitioning union herein has never been a party to these proceedings, through intervention or otherwise. The order of the court below, on which petitioner apparently relies for its status, was nothing more than the equivalent of an order permitting it to express its views as *amicus*

curiae (*cf.* Rules of U. S. Supreme Court, Rules 42, 44 [subd. 7]; *Halesion Drug Stores, Inc.* v. *N. L. R. B.*, 190 F. 2d 1022 (9th Cir.)).

There is thus a strong current of authori ..at leave to intervene may not be granted to a private person or group, such as the charging party, before the Board, for the purpose of supporting the Board's petition for enforcement of its order. (*Amalgamated Meat Cutters* v. *N. L. R. B.*, 267 F. 2d 169 (1st Cir.), cert. den., 361 U. S. 863; *Halesion Drug Stores, Inc.* v. *N. L. R. B.*, *supra*, 190 F. 2d 1022 (9th Cir.); *Stewart Die Casting Corp.* v. *N. L. R. B.*, 132 F. 2d 801, 804 (7th Cir.); *Aluminum Ore Co.* v. *N. L. R. B.*, 131 F. 2d 485, 488 (7th Cir.).) Furthermore, the lack of standing of the private person or group is of a jurisdictional nature (see *Amalgamated Utility Workers*, *supra*, 309 U. S. at 270), and it has been held that intervention may not be granted even with the parties' consent (*Amalgamated Meat Cutters* v. *N. L. R. B.*, *supra*; *Halesion Drug Stores, Inc.* v. *N. L. R. B.*, *supra*).

Indeed, even if an order of intervention had been granted to Independent by the court below, it would have been no more effectual than the order of intervention in *Amalgamated Utility Workers*, *supra* (*cf.* 309 U. S. at 263). For under the doctrine of that case, the intervening union would not have possessed the "independent right to relief" requisite for appellate review (*cf. Boston Tow Boat Co.* v. *United States*, 321 U. S. 632, 634; *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 283).

II

The Court of Appeals Correctly Applied the Controlling Standards of Judicial Review in Setting Aside the Board's Order

This case does not present any important, general or novel question of law warranting review by this Court. The primary (and first) question posed by petitioner is nothing more than whether the Court of Appeals "misappre-

hended" or "grossly misapplied" the controlling standards of judicial review (*Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 491; *Labor Board* v. *Walton Mfg. Co.*, 369 U. S. 404, 408). It is clear that that court scrupulously respected those standards, and that it was fully warranted in holding that the Board's decision lacked the support of substantial evidence under the criteria laid down by this Court in *Universal Camera Corp., supra.*

The crucial question, in the Board's own view, was whether Independent was merely a continuation of Local 335, UMD under a new name. "The focal point is the vote at the meeting of May 29 together with subsequent 'ratification'" (Opinion of Hays, C. J., App. B of Pet., p. 31). Under the Board's own findings, as noted above, the May 29th vote was not of itself effectual as action of the contracting union, binding on the union or its membership, since it "was not, standing alone, fairly representative of the wishes of the majority of the local's members, a substantial portion of whom were in effect disenfranchised" (H.C. App. 35a). The disaffiliation vote was thus nothing more than the expression of the wishes of a small faction, comprising less than 20% of the total membership, and the position of the newly formed Independent was consequently nothing more than that of a new rival organization. Cf. *Kearney & Trecker Corp.* v. *N. L. R. B.*, 210 F. 2d 852, 856 (7th Cir.), cert. den., 348 U. S. 824.

"Keeping in mind that the issue is not whether a substantial part of the membership wished to withdraw from the Local and form a new organization, but whether the old organization merely changed its name and affiliation, what is to be said of the subsequent 'ratification' of this disaffiliation vote?" (Opinion of Hays, C. J., App. B of Pet., p. 32.)

In the Board's own view, the disaffiliation vote could not be regarded as valid action of the local union binding upon its entire membership, unless it represented the free and deliberate choice of the majority of its members expressed at a meeting held on due notice at which "the employees

involved have had an opportunity to exercise their judgment on the merits of the conflict" (see *Hershey Chocolate Corp.*, 121 N. L. R. B. 901; H.C. App. 35a). Any claimed ratification by a majority would necessarily have to satisfy the same requisites.

The only evidence before the Board relating to the alleged "ratification" was that over a period of anywhere from one to four months after the disaffiliation vote a majority of the employees had individually signed cards of undisclosed form and content, apparently signifying their acceptance of the affiliation with the S.I.U., and that some two months after the disaffiliation vote they had individually indicated their willingness to support the strike called by the S.I.U. local. There was no showing whatever, however, that in being asked to sign the S.I.U. cards or to sign up for picket duty, the individual members were accorded the full and free "opportunity to exercise their judgment" as to whether or not to disaffiliate from the UMD. On the contrary, the evidence is undisputed that the employees were given no choice whatever in that regard, and that certainly they did not have a free choice.

The disaffiliation was then represented by the Wilhelm faction to be a *fait accompli*, and beyond recall; that faction had indeed started functioning as an unaffiliated local union immediately after the May 29th disaffiliation vote, and by letters to the employers (on May 29th and June 2nd and 10th) as well as to the union membership (on June 3rd and 10th) had asserted the position that the disaffiliation was an accomplished fact (G.C. Exh.'s 2D2, 2E1, 2F, 7, 8; H.C. App. 24a-26a, 27a-28a). The only choice offered to the individual members was at most that of accepting or not accepting the *S.I.U. charter*. As the court below noted, "For all that appears a large number of the signers may have preferred not to disaffiliate from the United Marine Division, but, if such disaffiliation was inevitable, then and only then to affiliate with the Seafarer's" (App. B of Pet., p. 33).

The mere fact that a majority of the employees signified their support for the new organization certainly would not establish that that organization was a continuation of the original local. As the court below pointed out (App. B of Pet., pp. 28-29), unless the Board could rationally conclude that Independent was a continuation of the original contracting union, the employers concededly could not lawfully have dealt with it even if Local 335, UMD were repudiated by a majority of the employees. This results from the Board's contract-bar doctrine, which requires an employer to continue to deal with a contracting union for the balance of the term of the contract even if a majority of the employees transfer their support to another union, unless and until such other union is certified at a Board-conducted election. (*N. L. R. B.* v. *Marcus Trucking Co.*, 286 F. 2d 583, 593 (2d Cir.); *Montgomery Ward & Co., Inc.*, 121 N. L. R. B. 188; *Dick Brothers, Inc.*, 107 N. L. R. B. No. 219; *B & B Beer Distributing Co., Inc.*, 124 N. L. R. B. No. 185; *cf. Brooks* v. *N. L. R. B.*, 348 U. S. 96).

The Board indicated no intent to depart from its contract bar rule in this case. On the contrary, it affirmed the Examiner's finding that the contract bar rule was here applicable (H.C. App. 32a, 40a). The Board further made it clear that its decision was predicated solely on its finding that Independent was the "*alter ego* or continuance" of the contracting local (H.C. App. 37a-38a), and it is on that basis that the Board's order is reviewable (*Securities and Exchange Comm.* v. *Chenery Corp.*, 318 U. S. 80, 87; *N. L. R. B.* v. *Lundy Manufacturing Corporation*, 286 F. 2d 424, 426 (2d Cir.)).

In any event, it is clear that no effect can be given to the asserted fact of majority support, whether on the theory of ratification or otherwise, since the Wilhelm group solicited and obtained any such support from May 29, 1960 onwards under "a deceptive cloak of authority" as the purported continuation of the original contracting local, with the exclusive right to administer the existing contracts, including the union security clause. *Cf. Garment Workers*

v. *Labor Board*, 366 U. S. 731, 736, 737; *Kearney & Trecker Corp.* v. *N. L. R. B.*, *supra*, 210 F. 2d 852, 857-8. Confronted by these pretensions, the individual employee could certainly not be regarded as having exercised a free and deliberate choice (*cf. Garment Workers* v. *Labor Board*, *supra*, 366 U. S. at 736).

Furthermore, in view of the "safeguards to voluntary choice" affecting disaffiliation action, which the Board itself has insisted upon, it is manifest that any subsequent ratification of abortive disaffiliation action "should occur by a procedure no less solemn" (*cf. Brooks N. L. R. B.*, *supra*, 348 U. S. 96, 99). The Board has thus insisted that any disaffiliation action must be accomplished "by formal group action" taken at a duly held representative meeting of the local. *Charles Beck Machine Corporation*, 107 N. L. R. B. 874; *Hershey Chocolate Corp.*, *supra*, 121 N. L. R. B. 901; *Dick Brothers, Inc.*, *supra*, 107 N. L. R. B. No. 219. It is clear that "ratification" of otherwise ineffectual disaffiliation action through the medium of approaches to individual members, as in the present case, cannot be accepted as a substitute for collective action taken at a properly held meeting. The sanctioning of such approaches would undermine the basic policies underlying the Act, as declared by the Board itself, by facilitating raids, subverting contract stability and enabling a dissident faction to seize control of a local union and thereafter gain majority support under a deceptive cloak of authority. The Board has thus emphasized that it "will not permit the 'schism' doctrine to be used to facilitate raiding by a rival union". See *Roberts Brass Mfg. Co.*, 114 N. L. R. B. No. 18; *Hershey Chocolate Corp.*, *supra*, 121 N. L. R. B. 901; *Dick Brothers, Inc.*, *supra*, 107 N. L. R. B. No. 219.

Further militating against the premise that the alleged acts of "ratification" reflected the free and untrammeled choice of the membership, is the significant circumstance that when the cards were signed and the signing up for picket duty occurred, the local which the men were asked to support was already under the aegis of a rival interna-

tional, the Seafarers. The Seafarers, in addition, made available their Hall for the holding of the strike meeting of July 17, as well as for the signing up of members for picket duty, and apparently also for the signing of the S.I.U. cards; and a representative of the Seafarers addressed the strike meeting (T. 771-2, 779, 194; H.C. App. 84a-85a, 79a).

The Board itself has thus declined to regard as action of the contracting union, a purported disaffiliation vote of the membership which takes place at the meeting hall of a rival organization and which is assisted by the rival organization. See *Dick Brothers, Inc., supra*, 107 N. L. R. B. No. 219; see also *Roberts Brass Mfg. Co., supra*, 114 N. L. R. B. No. 18.

The mere facts, stressed by the Examiner, that the new local took possession of the assets and records of the contracting local, and that four of the eight members of the contracting local's executive board purported to continue as officers of the new local (H.C. App. 36a), were in no way probative of the continuance of the original organization in the new (see opinion of Hays, C. J., App. B of Pet., p. 34). Indeed, the Examiner adverted to that evidence only after having first reached the conclusion that the May 29 disaffiliation action was retroactively validated by the alleged acts of "ratification" (H.C. App. 36a).

Obviously, neither the Examiner nor the Board intended to hold that a non-representative faction in a local, led by a few officers, could form a new local union and transfer thereto the contracts, assets and records of the old local, without formal group action representative of the wishes of a majority of the membership. The decisions of the Board itself as well as of the courts make it clear that the mere fact that the new local in such a case may have the "accoutrements" of the old local, including the officers, assets and records, cannot operate to vest the new local with the identity of the original contracting union. *Hershey Chocolate Corp., supra*, 121 N. L. R. B. 901 (where the

Board emphasized that the officers transferring their allegiance to the new local "may or may not reflect the employees' wishes"); *Dick Brothers, Inc., supra*, 107 N. L. R. B. No. 219 (where all the officers and committeemen of the old local continued on in the same positions in the new local); *Kearney & Trecker Corp. v. N. L. R. B., supra*, 210 F. 2d 852, 856, 857; *M and M Wood Working Co. v. N. L. R. B.*, 101 F. 2d 938, 941 (9th Cir.).

As the court below pointed out, the original contracting local did not disappear or become defunct, but continued to function actively, claiming to be the rightful holder of the contracts and administering such contracts to the extent it was permitted to do so (App. B of Pet., pp. 34-5). Nor did the Board make any finding that the original contracting local was defunct. On the contrary, it made a finding that the appointment of Anglim as temporary administrator did *not* render the local defunct (H.C. App. 31a-32a). And since the new local formed following the May 29 vote, did not acquire the status of the contracting local, even under the Board's own findings, at least until the subsequent purported acts of ratification some two or more months later, the UMD local obviously continued in being as the original contracting organization.

The Examiner's conclusion that the UMD local became "basically a different organization" (than the contracting local) from and after May 29 (H.C. App. 38a), was therefore unsupportable on its face, since it was in direct conflict with those findings. The mere fact, on which the Examiner relied, that Local 335, UMD after May 29 solicited the scow captains to sign new membership cards (H.C. App. 37a) in no way supported the Examiner's conclusion. Since Wilhelm had taken possession of all of the old cards, Local 335, UMD was of necessity obliged to use new cards. The emphasis thus placed on the new cards is, moreover, inconsistent with the Examiner's reliance on the local's securing the signature of some 500 members to new S.I.U. cards (H.C. App. 36a). The Examiner's reliance on the circulation of a "new constitution", is similarly misplaced since

there is no showing that the document in question was anything more than a "*proposed* new constitution" or that it was ever adopted (H.C. App. 37a).

The Examiner's conclusion that it was Local 335, UMD, rather than Independent, that resorted to "raiding" tactics (H.C. App. 37a), was predicated on his finding that the "ratification" of the May 29 disaffiliation action operated to vest Independent with the status of the original contracting local. Since, however, as noted above, that finding is unsupportable and cannot stand, the conclusion with regard to "raiding" likewise necessarily falls.

In short, the situation here presented was a fairly typical example of the secession of part of the membership to form a new organization. As the court below correctly held, there was no substantial evidence to support a finding that this new organization was merely the "*alter ego* or continuance" of the original union. Obviously, the employers could not be required to bargain with this new rival union unless and until its majority status was established at a Board-conducted election.

III

The Contention as to the Alleged Invalidity of the Appointment of the Administrator of the Contracting Local Has No Relevance to This Case and Is Not a Question Presented by the Record Herein

Petitioner's purported second question—as to the effect of a parent union's appointment of a trustee for a subsidiary local in the absence of express provision therefor in the parent union's constitution or by-laws—is simply not presented by this record. The very contention here urged by petitioner was rejected by the Board as "immaterial to the issues" (H.C. App. 31a), and it is settled that the Board's order is reviewable only upon "the grounds • • • upon which the record discloses that its action was based"

(*Securities and Exchange Comm. v. Chenery Corp., supra*, 318 U. S. 80, 87; *N. L. R. B. v. Laddy Manufacturing Corporation, supra*, 286 F. 2d 424, 426).

In any event, it is clear that the Board was correct in holding, in consonance with its prior decisions, that the alleged invalidity of the appointment of the administrator (or trustee) had no effect on the local's status as a labor organization or on the rights of any of the parties to this controversy, and that it was not the function of the Board to consider any such question (H.C. App. 31a, fn. 27; *Jat Transportation Corp.*, 128 N. L. R. B. No. 95; *Terminal System, Inc.*, 127 N. L. R. B. 979, 980-1).

Petitioner's primary reliance is on Section 302 of the Labor Management Reporting and Disclosure Act of 1959 (29 U. S. C., Sec. 462), which, petitioner claims, renders invalid a parent union's appointment of a trustee for a local in the absence of authorization therefor in the parent's constitution. Petitioner, however, has overlooked Section 603(b) of the same Act (29 U. S. C., Sec. 523(b)), which provides, so far as here pertinent, that nothing contained in that Act shall "be construed to * * * impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended". The Board has held that that section "in effect provides that the provisions of the Act relied upon shall not be controlling in determining whether the * * * [particular local union] is a qualified labor organization" for the purposes of a proceeding under the National Labor Relations Act (*Jat Transportation Corp., supra*). The Board has further emphasized that it is "not the proper forum" in which to litigate issues arising under the statute here relied upon by petitioner (*Terminal System, Inc., supra*). The Trial Examiner stressed the same considerations in his decision herein (H. C. App. 31a, fn. 27).

Furthermore, petitioner's assumption that the invalidity of Anglin's appointment would necessarily vest it with the status of the original contracting organization, is a

complete *non-sequitur*. If that position were sound, it would mean that a small non-representative faction of a local could secede in the event of the parent union's allegedly invalid appointment of a trustee for the local, and take with it the entire membership and the records, assets and contracts of the local, regardless of the wishes of the majority. As shown above, the Board never intended to reach any such conclusion in this case, and the position urged by petitioner would be in conflict with the applicable decisions of the Board and the courts and with the fundamental policies underlying the National Labor Relations Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 23, 1963.

APPENDIX A

Additional Statute Involved

Section 603(b) of the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 540, 29 U. S. C., § 523(b)) reads as follows:

> "§ 603. Retention of rights under other Federal and State laws
>
> . . . .
>
> (b) Nothing contained in titles I, II, III, IV, V, or VI of this Act shall be construed to supersede or impair or otherwise affect the provisions of the Railway Labor Act, as amended, or any of the obligations, rights, benefits, privileges, or immunities of any carrier, employee, organization, representative, or person subject thereto; nor shall anything contained in said titles (except section 505) of this Act be construed to confer any rights, privileges, immunities, or defenses upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended."

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No. 150

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 700

DECK SCOW CAPTAINS LOCAL 335, INDEPENDENT,
PETITIONER

v.

HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS, ET AL.[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

This petition seeks review of the judgment of the court of appeals denying enforcement of an order entered by the National Labor Relations Board against Harbor Carriers of the Port of New York (an employer association), certain other employers, and Deck Scow Captains Local 335, United Marine Division, National Maritime Union, AFL–CIO. Petitioner was the charging party before the Board, prevailed before the Board, and was permitted to intervene in the court of appeals.

[1] This is the correct caption of this case. The petition bears the caption of the proceedings in the court of appeals.

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The principal question presented is whether substantial evidence supports the Board's findings that Harbor Carriers and the other employers withdrew recognition from the union with which they had an existing contract and recognized and dealt with another union, thereby violating Sections 8(a)(1), (2), (3) and (5) of the National Labor Relations Act.[2] These ultimate findings turn, as the court below recognized (Pet. 31), on the validity of the Board's subsidiary finding that petitioner Local 335, Independent is the same union as the original Local 335, UMD–NMU, and that the entity now claiming to be Local 335, UMD–NMU is a different union.

The Board found that, in 1959, Harbor Carriers and the other employers entered into contracts with Local 335, UMD–NMU, as the representative of their employees working on scows. In May 1960, while the contracts were still in effect, several of the local's officers resigned and, at a meeting attended by about one-fifth of the local's total membership, there was a vote to disaffiliate from the UMD. In the meantime, the UMD notified the employers that a temporary administrator had been appointed to operate the local and that they should thereafter deal with him on matters concerning the contract. The employers recognized the temporary administrator of Local 335, UMD–NMU, and let him apply the existing contracts; they declined to recognize Local 335, Independent

[2] The Board also found that the other union, by requesting enforcement of the union security provisions of that contract, violated Section 8(b)(2) and (1)(A) of the Act.

[3] The facts hereafter set forth are detailed in the opinion of the court below (Pet. 27–28).

which claimed to be a continuation of the original Local 335, UMD–NMU. The Board concluded, in agreement with Local 335, Independent, that the entity represented by the temporary administrator was in reality a different labor organization. Accordingly, the Board held that the employers unlawfully refused to bargain with Local 335, Independent by withdrawing recognition from it, and illegally assisted the current Local 335, UMD–NMU and unlawfully discriminated by extending the contracts to it and by enforcing their union security provisions in its favor.

The court of appeals (Judge Kaufman dissenting) held that the evidence did not support the Board's finding that Local 335, Independent was a continuation of the original Local 335, UMD–NMU. The court ruled that the entity represented by the temporary administrator was the real Local 335, UMD–NMU. Hence, the court held that the employers acted properly in continuing to recognize Local 335, UMD–NMU, and in permitting it to administer the existing contracts. (Pet. 31–39.)

The court of appeals appears to have applied the proper standard of review under *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474.[1] While the Board disagrees with the court's evaluation of the evidence in this case, it does not believe that this factual question warrants further review, and it is, therefore, not filing a petition for a writ of certiorari.[2] If, however, the Court grants

[1] In addition to the evidentiary issue, petitioner argues (Pet. 16–19) that the appointment of the temporary administrator, without complying with the provisions of Title III of the

the present petition, the Board intends to participate in defense of its order.

Respectfully submitted.

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JANUARY 1963.

Labor-Management Reporting and Disclosure Act of 1959, raises important questions concerning the "interplay of the provisions" of that statute and the National Labor Relations Act. As petitioner recognizes (Pet. 16), however, the court of appeals found it unnecessary to reach the issue, since it ruled that the Board's finding was not supported by substantial evidence. In these circumstances, we do not believe that the issue is properly before the Court. In any event, the argument ignores Section 603(b) of the LMRDA (73 Stat. 540), which provides in pertinent part that the provisions of Title III shall not be construed "to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended."

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IN THE

Supreme Court of the United States

October Term, 1962

No. 700

HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS,

v.

NATIONAL LABOR RELATIONS BOARD.

GALLAGHER BROS. SAND & GRAVEL CORP., BILKAY HOLDING CORP., HAMPTON SCOWS, INC., NEPTUNE LINE, INC. and ROCKVILLE SCOWS, INC.,

v.

NATIONAL LABOR RELATIONS BOARD.

NATIONAL LABOR RELATIONS BOARD,

v.

CHARLES J. KING and DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION, AFL-CIO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION AFL-CIO, IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION AFL-CIO, IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals is reported at 306 F. 2d 89. The order denying the petition for rehearing is not reported but is reproduced as Appendix B, pages 40-41 of the petition herein. The National Labor Relations Board's (hereafter "the Board") Finding of Facts to-

gether with its Decision and Order are reported at 136 NLRB No. 79.

Jurisdiction

The last decree of the Court below was entered on October 1, 1962. The within petition was filed on December 28, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether a charging party (in a National Labor Relations Board proceeding) has *per se* standing in the Court to petition for certiorari which would bring about the enforcement of a Board order denied enforcement by the Court of Appeals where the Board does not so petition.

2. Whether certiorari may be granted in other than a case of conflict of courts of appeal or for important questions affecting the public interest.

3. Whether the regularity of the appointment of an administrator, not being an issue in the Board proceeding, may now be raised by the charging party.

Statement

Local 335, United Marine Division, National Maritime Union, AFL-CIO (hereinafter called "Local 335, UMD"), has been for many years a chartered local of the United Marine Division, National Maritime Union, AFL-CIO, and has had collective bargaining contracts with the (Harbor Carriers) Association members. The last contract was for the period May 1, 1959, to March 31, 1961. During this period, in May, 1960, a group within Local 335, UMD, started a movement to disaffiliate Local 335 from the UMD. A special meeting of Local 335 was allegedly called for May 29, 1960, to vote on the proposed disaffilia-

tion; at the meeting there was a vote of approximately 130-140 for, and 8-14 against disaffiliation, although the membership numbered 700-750.

As early as May 20, 1960, the Secretary-Treasurer of the UMD, a Mr. Willard Quick, wrote the Association informing them that Local 335 was having internal troubles and that a Mr. Thomas Anglim had been appointed temporary administrator and would handle the affairs of Local 335, UMD. On May 29, 1960, the disaffiliated group also served notice on the Association that they were administering the labor contracts of Local 335. On June 19, 1960, the disaffiliated group affiliated themselves with the National Maritime Union's rival in the AFL-CIO, the Seafarers' International Union. The jurisdictional question of who was raiding whom (*NMU* v. *SIU*) was put to the President of AFL-CIO, and he ordered SIU to withdraw its charter. The SIU withdrew its charter in September, 1960.

The disaffiliated group (hereafter the "Independent") filed unfair labor practice charges against the Association and Local 335, United Marine Division. The charges terminated in the issuance on April 4, 1962, of an order against the Employer Association and Local 335, UMD. Both the Association and Local 335, UMD, petitioned the Court of Appeals (Second Circuit) to review the Board's order and set it aside. The Board petitioned for enforcement. Independent sought to intervene as a party but its motion was denied; it was however, permitted to intervene only for the purpose of filing a brief and presenting oral argument in support of the Board's petition for enforcement. The Court of Appeals, in its decision, refused enforcement and set aside the Board's order. Rehearing was denied.

QUESTION 1

Only the NLRB has the right to petition for certiorari in reference to one of its orders.

The legislative Act which created the Board has the force of charging the Board with the protection of certain rights in the public interest. To hold it permissible for a private party to institute proceedings for enforcement would usurp the authority of the Board and violate the obvious intent of the Act, since it is by means of such proceedings that the Board implements its decisions and administers the Act. That this is the law is clear from the following statement of this Court in referring to an NLRB order in *Amalgamated Utility Workers* v. *Consolidated Edison Company* (309 U. S. 261).*

> "As the court has no jurisdiction to enforce the order at the suit of any private person or group of persons, we think it clear that the court cannot entertain a petition for violation of its decree of enforcement save as the Board presents it." (309 U. S. 270)

In *The Mine Mill and Smelter Workers* v. *Eagle-Picher Mining and Smelting Company* (325 U. S. 335) the court held that although Unions have standing to *contest* Board orders, the sole authority to institute proceedings for *enforcement* of a Board order lies with the Board.

At the Court of Appeals level the Independent did not petition for review of the Board's order but was permitted to intervene for the purpose of submitting a brief and presenting oral argument in support of the Board's petition for enforcement. The Independent was denied the right to intervene as a party to the action by the Court of Ap-

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* See also *Amalgamated Meat Cutters, etc.* v. *N. L. R. B.*, 267 F. 2d 169-170; CA-1 cert. denied, 361 U. S. 863; *Aluminum Ore Co.* v. *N. L. R. B.*, 131 F. 2d 485 and 488 (CA-7, 1942); *Halcston Drug Stores, Inc.* v. *N. L. R. B.*, 190 F. 2d 1022 (CA-9, 1951); *N. L. R. B.* v. *Florida Citrus Canners Cooperative*, 288 F. 2d 630 (CA-5, 1961).

peals, and did not appeal the denial. Thus, in the Court of Appeals action, the Independent did not petition for enforcement, nor was it a respondent, nor any other type of party to the action, and was indeed denied the right to be a party to the action. It was merely permitted to file a brief and to present arguments in the position of *amicus curiae*.

Thus, in its present petition, the Independent is attempting to substitute itself for the Board and therefore to become, on the appellate level, a party in an action to which it was originally denied the right to become a party. Nowhere can authority be found to permit an *amicus curiae* to substitute itself for the party it supports in seeking an appeal from a decision adverse to that party, if the party itself chooses not to seek an appeal. In the instant case, the Board either accepts the decision of the Court of Appeals, or for reasons which it does not disclose, prefers that the decision not be appealed. To use or not to use the processes of the courts in administering the Act lies solely and entirely with the Board, charged as it is with the responsibility of carrying out the duty delegated to it by Congress.

QUESTION 2

The review of evidence to insure conformity with the standard of review of the Act is primarily the province and function of the Court of Appeals, and in only the rare case of a failure to understand that standard or where the standard has been grossly misapplied is review in this Court warranted.

Those rare instances in which certiorari is granted are narrowly limited by the Supreme Court. In *N. L. R. B.* v. *Pittsburgh Steamship Co.* (340 U. S. 498) this Court in considering a writ of certiorari relative to a court of

appeals decision on the enforcement of a Board order stated at page 502:

> "But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court (of appeals) shall be exclusive and its judgment and decrees shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari * * *' Taft-Hartley Act, Sec. 10, (e), 61 Stat. 148, 29 USC (Supp III) Sec 160 (e); Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' *Layne and Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393; Revised Rules of the Supreme Court of the United States, Rule 38 (5)."

There is no contention in the Independent's petition that any conflict of authority among courts of appeal has been created by the ruling in question. It must be concluded therefore, in the light of the citation above, that the present petition is based on the alleged existence of a threat to the public interest. As is established in Question 1 above, if the public interest is involved, then it is up to the Board, as the body duly delegated to protect the public interest in such matters, to exercise its discretion as to the proper course of action to be taken in carrying out its function. Therefore, the present petitioner cannot request a review of evidence, since his petition does not fall within the scope of either of the two exceptions defined in the citation above.

QUESTION 3

The legality of an administrator's appointment is not an issue in this case.

Whether or not the administrator of Local 335, UMD was legally appointed within the framework of the Union's constitution or in accordance with the provisions of the Labor-Management Reporting and Disclosure Act has no bearing upon the actual existence of the Union. As the Examiner has stated in his intermediate report, p. 16:

> "The existence or non-existence of constitutional authority to support the United Marine Division's act is immaterial to the issue herein."

Since such appointment was not an issue in the Board proceedings, it is subject to review neither by the Court of Appeals nor this Court.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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